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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CARLOS ERNESTO MARROQUIN, Defendant and Appellant.	B265242 (Los Angeles County Super. Ct. No. TA135354)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Affirmed in part, reversed in part, and remanded with directions.

Rachel Lederman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and Elaine F. Tumonis, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Carlos Marroquin of several crimes, including attempted kidnapping for carjacking and impersonating a police officer. The trial court sentenced Marroquin to the upper term for attempted kidnapping for carjacking, and a consecutive term for impersonating a police officer. Marroquin argues that the court erred by not stating on the record its reasons for these two sentencing decisions. The record confirms, however, that the court did its state reasons. Moreover, any error in failing to state its reasons sufficiently was harmless. Therefore, we affirm those sentencing decisions. We reverse, however, Marroquin's conviction for attempted carjacking, and remand the case for resentencing on several other convictions.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Crimes*

Late at night on October 2, 2014, Tiffany Menendez, who was 25 years old at the time, stopped at a large discount retail store on her way to her boyfriend's house. The parking lot was "really dark." Marroquin, wearing a uniform with a gold badge with black letters that said "Police," approached Menendez while she was putting her purchases in her car. Marroquin tapped her car window, pointed to her tire, and mouthed out words that her tire was flat. Menendez opened her car door to check her tire. Marroquin approached the open door and accused Menendez of stealing from the store. Menendez offered to show Marroquin her

receipt. Marroquin looked at the receipt, said he was calling for backup, and told her "to move over to the passenger seat."

At this point, Menendez became suspicious, but she could not drive away because Marroquin was standing in the open door. When Menendez refused to move over, Marroquin began pushing her with his right shoulder with "a lot of force." Marroquin said that if Menendez did not keep quiet and move over to let him into the car, he was going to rape her. According to Menendez, Marroquin took out a semiautomatic gun, pointed it at her stomach, and then "pulled out a knife." Menendez started yelling when Marroquin pulled out the gun. Marroquin told her to do what he said if she did not want to die. Menendez screamed and continued to push back against Marroquin. Menendez testified, "I was just trying to survive, stay alive. I didn't know what was going to happen. I thought he was gonna stab me, shoot me, take me away."

Alerted by the sound of a woman screaming, two shoppers saw Marroquin assaulting Menendez. The witnesses called 911 and watched as Marroquin fled in his pickup truck. Menendez closed her door, locked it, and drove up to the front of the store. She testified, "I was really scared. I was in shock. I was shaking, crying."

After Marroquin's arrest, Menendez and one of the witnesses identified Marroquin as Menendez's attacker. During the attack, Marroquin cut Menendez's finger with the knife.

B. *The Charges*

The People charged Marroquin with attempted kidnapping for carjacking (Pen. Code, §§ 664, 209.5, subd. (a)) (count 1),[1] attempted carjacking (§§ 664, 215, subd. (a)) (count 2), assault with a deadly weapon (a knife) (§ 245, subd. (a)(1)) (count 3), making a criminal threat (§ 422, subd. (a)) (count 4), and impersonating a public officer, investigator, or inspector (§ 146a, subd. (b)) (count 5). The People also alleged that Marroquin personally used a firearm to commit the crimes alleged in counts 1 and 2 (§ 12022.53, subd. (b)), personally used a firearm in the commission of a felony or attempted felony (§ 12022.5, subd. (a)), and personally used a deadly or dangerous weapon (in this case, a knife) to commit the crimes alleged in counts 1, 2, 4, and 5 (§ 12022, subd. (b)(1)).

C. *Conviction and Sentence*

A jury convicted Carlos Marroquin on all counts, and found true the allegation that Marroquin used a deadly or dangerous weapon to commit the crimes alleged in counts 1, 2, 4, and 5 (§ 12022, subd. (b)(1)). The jury did not reach a verdict on the allegation that Marroquin personally used a firearm during the commission of the crimes alleged in counts 1, 2, 4, and 5. The trial court denied the People's request for a retrial on the personal firearm use allegations and dismissed them.

The trial court sentenced Marroquin to an aggregate prison term of 10 years eight months. On count 1, attempted kidnapping for carjacking, the court sentenced Marroquin to the upper term of nine years, plus one year for the dangerous or

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1 Statutory references are to the Penal Code.

deadly weapon enhancement pursuant to section 12022, subdivision (b)(1), for a total of 10 years. On count 2, attempted carjacking, the trial court imposed and stayed pursuant to section 654 a term of four years and six months, plus one year for the use of a deadly or dangerous weapon pursuant to section 12022, subdivision (b)(1). On count 3, assault with a deadly weapon, the trial court sentenced Marroquin to the middle term of three years, to be served concurrently. The trial court did not impose a term on count 4, making a criminal threat, stating only that sentence "will be stayed pursuant to Penal Code section 654."[2] On count 5, impersonating a public officer, the court imposed a term of eight months (one-third the middle term of two years), to be served consecutively to the sentence on count 1, but the court did not impose any sentence for the weapon enhancement under section 12022, subdivision (b)(1).[3]

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[2] The minute order states that the trial court imposed and stayed pursuant to section 654 a term of eight months (one-third the middle term of two years), plus one year for the weapon enhancement under to section 12022, subdivision (b)(1), but the court did not impose that sentence at the hearing. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 ["[t]he record of the oral pronouncement of the court controls over the clerk's minute order"]; *People v. Vega* (2015) 236 Cal.App.4th 484, 506 ["'[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls'"].)

[3] The minute order states that the trial court imposed and stayed pursuant to section 654 a term of one year for the weapon enhancement. At the hearing, however, the trial court did not impose or stay any sentence on the enhancement.

DISCUSSION

Marroquin argues that "the trial court committed reversible error by failing to state reasons for its selection of the upper term as to count 1, and consecutive sentences as to count 5." Marroquin asserts that the trial court did not "incorporate the probation report or refer to the Rules of Court, but proceeded to pronounce sentence without giving any reasons for its choice of the upper term as to count 1, or its choice to run count 5 consecutively."

A. *The Trial Court Sufficiently Stated Its Sentencing Reasons*

A trial court has broad discretion in deciding whether to impose an upper, middle, or lower term (§ 1170, subd. (b); *People v. Boyce* (2014) 59 Cal.4th 672, 729; *People v. Wilson* (2008) 164 Cal.App.4th 988, 992) and whether to impose consecutive or concurrent sentences (*People v. Monge* (1997) 16 Cal.4th 826, 850-851; *People v. Cornejo* (2016) 3 Cal.App.5th 36, 67).[4] The court, however, must state the reasons for its decision to impose an upper term or consecutive terms on the record and in simple language, although the court does not need to use the language of the court rules. (§ 1170, subds. (b), (c); Cal. Rules of Court, rule 4.406(a);[5] *People v. Boyce*, at p. 726, fn. 30.) "Typical sentence choices requiring a statement of reasons include imposing a

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[4] We review the trial court's sentencing decisions for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

[5] References to rules are to the California Rules of Court.

prison term (and thereby denying probation) (rule 406(b)(2)), imposing the upper term rather than the midterm (rule 406(b)(4)), and imposing consecutive sentences (rule 406(b)(5)).” (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1769; see *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1371 [“a trial court is required to state its reasons for any sentencing choice (e.g., imposition of an upper term) on the record at the time of sentencing”].)

Here, the trial court sufficiently identified the reasons it was imposing an upper term for attempted kidnapping for carjacking and a consecutive term for impersonating a public officer, albeit in response to Marroquin’s request at the sentencing hearing for probation. The court, after hearing from Marroquin’s wife and acknowledging the impact imprisonment would have on his family, stated that probation was not appropriate. The trial court noted Marroquin’s minor prior criminal history, his supportive family, his claimed drug use, and the circumstances of the crimes. The court stated, however, that Marroquin had sought out Menendez at a large discount retail store, committed an assault, used a knife “at the time of the kidnapping,” and terrified “a very young victim.” The court characterized Marroquin’s multiple crimes as “very violent,” for which the court needed to sentence him to prison. These reasons support the imposition of an upper term (rules 4.421(a)(1), 4.421(a)(2), 4.421(a)(8)) and consecutive sentences (rule 4.425(b)). And because the court stated more than two reasons, we presume the trial court relied on different factors in imposing the upper term on count 1 and a consecutive term on count 5. (See *People v. Osband* (1996) 13 Cal.4th 622, 728-729 [“[o]nly a single aggravating factor is required to impose the upper term [citation], and the same is true of the choice to impose a

consecutive sentence"]; *People v. Wiley* (1995) 9 Cal.4th 580, 592, fn. 7 [""[a] judgment or order of the lower court is *presumed correct*," and ""[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown""].)

People v. Price (1984) 151 Cal.App.3d 803, the case cited by Marroquin, is distinguishable. The trial court in that case did not state any specific reasons for its sentencing choices but simply parroted the words of the rules. The trial court in *Price* made only a cursory reference to the probation report, stating that "the circumstances in aggravation[ ] [are] more particularly set forth in the probation report, [which is] incorporated into and made a part of the Court's findings here." (*Id.* at p. 811; see *People v. Pierce* (1995) 40 Cal.App.4th 1317, 1320 ["[i]ncorporating by reference the enumeration of aggravating and mitigating factors in a probation report, as was done here, does not satisfy the requirement of a statement of reasons"]; *People v. Fernandez* (1990) 226 Cal.App.3d 669, 679 ["merely incorporating the probation report by reference violates the spirit of the sentencing laws and fails to properly explain the basis for any sentencing choice"].) In contrast, the trial court here stated specific reasons based on the facts of the case. The court did not merely repeat the language of the rules of court or incorporate the probation report by reference.

B. *Any Failure by the Trial Court in Stating the Reasons For Its Sentencing Decisions Was Harmless*

A trial court's failure to articulate its reasons for imposing an upper term or consecutive terms is harmless if the record contains sufficient evidence supporting the trial court's

sentencing choices to allow appellate review, or if it is not reasonably probable that resentencing would result in a more favorable sentence. (*People v. McLeod* (1989) 210 Cal.App.3d 585, 590-591; accord, *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1301; see *People v. Coelho* (2001) 89 Cal.App.4th 861, 889 ["[w]here sentencing error involves the failure to state reasons for making a particular sentencing choice, including the imposition of consecutive terms, reviewing courts have consistently declined to remand cases where doing so would be an idle act that exalts form over substance because it is not reasonably probable the court would impose a different sentence"]; *People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1686 ["[w]here . . . it is improbable that a lower court's sentencing choice would have been different if it had been rem[a]nded to state a proper reason, the constitutional provision forbidding reversal for insubstantial errors should apply"].)

Here, even if the court's statement of reasons was insufficient, any such error was harmless because there is ample evidence to support the trial court's decision to impose the upper term and consecutive sentences, and there is no reasonable probability the trial court would impose a different sentence on remand. Marroquin threatened to rape or kill Menendez while brandishing a weapon, which shows that his crime involved threats of great bodily injury and that Marroquin was armed with and used a weapon at the time he committed the crime. (See rules 4.421(a)(1), 4.421(a)(2), 4.425(b).) Menendez was relatively young and alone in a dark parking area late at night, evidencing that Marroquin's victim was particularly vulnerable. (Rule 4.421(a)(3); rule 4.425(b); see *People v. DeHoyos* (2013) 57 Cal.4th 79, 154 [""[v]ulnerability means defenseless, unguarded,

unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act""]; *People v. King* (2010) 183 Cal.App.4th 1281, 1322-1324 [victim was particularly vulnerable because of her youth and isolation].) And Marroquin prepared for and carried out the crime using deception by wearing a uniform and fake police badge and falsely telling Menendez that one of her car tires was flat, and then accusing her of stealing from the store, indicating planning and sophistication. (Rule 4.421(a)(8); 4.425(b); see *People v. Charron* (1987) 193 Cal.App.3d 981, 994 ["rule 421(a)(8) define[s] an exceedingly broad range of conduct"].) Finally, because there is evidence to support at least four aggravating factors, there is no danger the court used the same factor to justify both the upper term and consecutive sentences. (See *People v. Osband, supra*, 13 Cal.4th at p. 729 [improper dual use of same fact for imposition of both an upper term and a consecutive term was harmless where "the court could have selected disparate facts from among those it recited to justify the imposition of both a consecutive sentence and the upper term"]; *People v. Coleman* (1989) 48 Cal.3d 112, 166 ["[i]mproper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if '[it] is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error'"].)

C. *Marroquin's Conviction on Count 2 for Attempted Carjacking Must Be Reversed*

As noted, the jury found Marroquin guilty on count 1 of attempted kidnapping for carjacking and on count 2 of attempted carjacking. Because the latter is a lesser included offense of the

former, Marroquin cannot be convicted of both. (See *People v. Medina* (2007) 41 Cal.4th 685, 701 [attempted carjacking is a lesser included offense of attempted kidnapping during the commission of a carjacking]; *People v. Martinez* (2012) 208 Cal.App.4th 197, 199 ["[a] defendant cannot be convicted of both an offense and a lesser included offense"]; see also *People v. Robinson* (2016) 63 Cal.4th 200, 213, fn. 7 ["multiple convictions . . . may not be based on necessarily included offenses"].) As the People concede,[6] Marroquin's conviction for attempted carjacking must be reversed.

D. *The Case Must Be Remanded for Resentencing*

As noted, at the sentencing hearing the trial court did not impose a sentence on count 4, making a criminal threat. The minute order states that the court imposed and stayed pursuant to section 654 a term of eight months (one-third the middle term of two years), plus one year for the weapon enhancement under section 12022, subdivision (b)(1). Had the court imposed this sentence, it would have been unauthorized. "The one-third-the-midterm rule of section 1170.1, subdivision (a), only applies to a consecutive sentence, not a sentence stayed under section 654." (*People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1164.) It is unclear from the record, however, whether the trial court meant to impose this sentence.

Also as noted, at the sentencing hearing the trial court on count 5, impersonating a public officer, imposed a term of eight months (one-third the middle term of two years), to be served

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6 We asked for and received from each party a supplemental brief on whether we should reverse Marroquin's conviction on count 2.

consecutively to the sentence on count 1, but the court did not impose any sentence for the weapon enhancement under section 12022, subdivision (b)(1). Nor did the court strike the enhancement. (See *People v. Jones* (2007) 157 Cal.App.4th 1373.) The minute order states that the court imposed and stayed pursuant to section 654 the weapon enhancement, but it is unclear from the record whether the court meant to impose and stay execution of the enhancement because the court did not stay execution of sentence on the underlying offense.

We asked for and received from the People and Marroquin supplemental briefs on whether the court imposed unauthorized sentences on counts 4 and 5. The People acknowledge the trial court imposed an unauthorized sentence on count 4 and at the hearing failed to impose a sentence on the weapon enhancement for count 5. In light of the discrepancy between the oral pronouncement of judgment and the minute order, and the possibility that the court imposed an unauthorized sentence, a remand for resentencing is appropriate.

DISPOSITION

Marroquin's conviction on count 2 for attempted carjacking is reversed and the matter is remanded to the trial court with directions to enter a judgment of acquittal on that count. The trial court's imposition of the upper term of nine years on count 1, attempted kidnapping for carjacking, and a consecutive term of eight months on count 5, impersonating a public officer, is affirmed. The matter is remanded for resentencing on count 4, making a criminal threat, for the trial court to impose a sentence

on that count, and on count 5, impersonating a public officer, for the trial court to impose or strike the enhancement.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.